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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/354,450	12/12/1994	GARY K. MICHELSON	P10936V	3041

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MARTIN & FERRARO, LLP
1557 LAKE O'PINES STREET, NE
HARTVILLE, OH 44632

EXAMINER

DEMILLE, DANTON D

ART UNIT PAPER NUMBER

3764

DATE MAILED: 11/04/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

08/354,450

Applicant(s)

MICHELSON, GARY K.

Examiner

Danton DeMille

Art Unit

3764

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 20 September 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. **ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).**

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on 20 September 2004. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

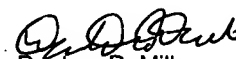
Claim(s) allowed: _____

Claim(s) objected to: _____

Claim(s) rejected: 29-300.

Claim(s) withdrawn from consideration: _____

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
10. ☐ Other: _____


Danton DeMille
Primary Examiner
Art Unit: 3764

Continuation of 5. does NOT place the application in condition for allowance because: Regarding the new matter issues a) and b), applicant points to pages 6 and 7 in the specification for support and states the surface of the meniscus is curved and extrapolates that the flexible member would then also curve as it deforms to the surface of the meniscus. The specification states that the flexible member deforms to the surface of the meniscus at an "angle of the meniscus" not to the curve of the meniscus. To state that the meniscus is curved and therefore the flexible member would also curve goes beyond the specification as originally disclosed. The specification states that the flexible member would conform by pivoting at an angle. To now state that it curves goes beyond what was originally disclosed. Regarding issues c) and d), applicant provides the basis for the mathematical calculations supporting the claimed flexible member having a greater surface area to mass ratio than that of the shaft. The drawings are not drawn to scale and therefore no specific dimensions and ratios can be made from drawings. Moreover, if this limitation were now critical to the patentability of the invention then the written specification would have provided support for these critical ratios.

Regarding issues e) and f), the claims have been amended to overcome these issues.

Regarding issue g), this issue has been withdrawn in view of applicant's arguments.

Regarding issue h), the claims have been amended to overcome this issue.

Regarding issue i), the claim positively recites that the flexible member is designed with this angle of less than 90 degrees however, this angle only exists after it has been inserted in the meniscus and the flexible member has deformed to take this angle. This angle may exist but only after it has been deformed during use.

Regarding issue j), applicant argues that the outer perimeter of the flexible member remains in the same plane as it moves from the position in figure 6 to the position in figure 7. It is agreed that the flexible member remains in the same plane thereby also supporting the examiner's position that the flexible member cannot be curved or concave as set forth in issues 1) and b) above. This issue has been withdrawn.

Regarding issues k) and l), the same above arguments above in issue i) would apply here as well. The claimed angles only exist during use and are not properties of the device as made.

Regarding Warren, applicant has taken Warren's dimensions of the head and improperly concluded that such dimensions are for strengthening of the head. It is not supported in Warren that these dimensions are to compensate for the method of driving the fastener into the tissue. Applicant's invention is also driven into the tissue by contacting the head of the fastener with a driver. Even with Warren's dimensions it still would not preclude the head from flexing at least to some extent. Moreover, changes in dimensions from Warren's invention are not seen as patentable. The same would apply to Bays.